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No. 77-1654

In the Supreme Court of the United States

OCTOBER TERM, 1978

CONSUMER FEDERATION OF AMERICA, ENERGY POLICY TASK FORCE, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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Petitioner, Consumer Federal of America, Energy Policy Task Force ("EPTF"), seeks review of the same judgment of the court of appeals that the Federal Energy Regulatory Commission is asking the Court to review in No. 77-1652, *Federal Energy Regulatory Commission* v. *shell Oil Company, et al.*[1]

The Commission adopted a regulation, 18 C.F.R. 157.41, providing that as of July 30, 1976, all certificates of public convenience and necessity issued to natural gas producers for the sale of natural gas for resale in interstate commerce were conditioned "to require that the seller shall observe the standard of a prudent operator to develop and maintain deliverability from reserves dedicated [under the certificate]." EPTF petitioned

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[1]We are furnishing petitioner with a copy of the Commission's petition in No. 77-1652.

for review of the regulation on the ground that the "prudent operator" standard was inadequate to assure fulfillment of certificated delivery obligations. Various producers petitioned for review on the ground that the regulation exceeded the Commission's jurisdiction. While maintaining its own challenge to the regulation, EPTF intervened in support of the Commission against the challenge by the producers.

The court of appeals agreed with the producers. It set aside the regulation on the ground that it applied to production and gathering activities that were excluded from the Commission's jurisdiction by Section 1(b) of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717(b) (Pet. App. 1a).

The question presented by the Commission in its petition for certiorari in No. 77-1652 is whether the "production and gathering" exclusion in Section 1(b) of the Natural Gas Act denies the Commission authority to require certificated producers to "observe the standard of a prudent operator" in developing and maintaining delivery of gas from their dedicated reserves so as to fulfill their duty to continue service under Section 7 of the Act.[2] The first question presented by EPTF (Pet. 2) is largely the same; the only material difference is that, instead of

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[2]The precise question as stated in the Commission's petition is as follows (Pet. No. 77-1652, p. 2):

> Whether the production and gathering exclusion in Section 1(b) of the Natural Gas Act denies the Federal Energy Regulatory Commission authority to require certificated producers of natural gas to "observe the standard of a prudent operator" in developing and maintaining delivery of gas from their dedicated reserves, so as to assure the fulfillment of their duty, under their certificates and Section 7 of the Act, to continue interstate service until the Commission authorizes them to abandon that service.

the "prudent operator" standard, EPTF speaks of the Commission's authority to enforce "in accordance with an appropriate standard" the delivery obligations of producers under their certificates of public convenience and necessity issued pursuant to Section 7 of the Act.[3]

In addition, EPTF presents a second question based on its contention in the court of appeals that the "prudent operator" standard adopted by the Commission does not constitute a proper measure for enforcing delivery obligations under certificates of public convenience and necessity (Pet. 2).

The court of appeals did not reach the second question because of its jurisdictional ruling against the Commission under the "production and gathering" clause.[4] Thus, EPTF's first question largely duplicates the question presented by the Commission, while EPTF's second question presents an issue that has not been decided by the court of appeals.

EPTF's petition should not be granted with respect to the second question it presents. Since that question has not been ruled on by the court of appeals, it is not

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[3]"1. Whether the Federal Energy Regulatory Commission is precluded by the 'production and gathering' exemption contained in Section 1(b) of the Natural Gas Act from enforcing, in accordance with an appropriate standard, the delivery obligations under certificates of public convenience and necessity issued to producers of natural gas pursuant to Section 7 of the Act" (Pet. 2).

[4]The court stated: "One final question raised concerns the 'prudent operator' standard promulgated by Order No. 539-B. The argument is advanced that the 'prudent operator' standard is inappropriate to FERC's goal to increase production of natural gas because 'prudent operator' is a term of art employed in state regulations which are concerned with increasing the total recovery of hydrocarbons through the *conservation* of natural gas fields rather than permitting operators to waste energy resources by *exploitation* of reserves. We do not reach the issue due to our disposition on jurisdictional grounds" (Pet. App. 10a n. 6; emphasis in original).

ripe for consideration by this Court at this time. If the Court grants review of the court of appeals' decision and reverses that court's ruling that the Commission lacked jurisdiction to adopt its rule, EPTF's contention will then be appropriate for initial consideration by the court of appeals on remand.[5] If, on the other hand, the Court denies review of the decision below or affirms that decision after review, there will be no reason for the Court to consider EPTF's claim that the Commission should have gone further. The Commission does not oppose the granting of EPTF's petition limited to the first question it presents.[6]

Respectfully submitted.

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Solicitor General.

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[5]The Commission contended below, and would contend on remand, that its rule should be upheld because the choice of remedies to enforce delivery obligations is committed to the Commission's responsible discretion. Cf. *Federal Communications Commission* v. *National Citizens Committee for Broadcasting*, No. 76-1471, decided June 12, 1978.

[6]Should its petition be denied and the Commission's petition be granted, EPTF could, of course, file a brief on the merits as a respondent in support of the petitioner in the latter case.

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